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WHOIS and Data Protection Policy

10 March 2020

Speakers:

Lauren Kapin, United States

Chris Lewis-Evans, United Kingdom

Georgios Tselentis, European Commission

ICANN67 - Agenda Item 5

ICANN | GAC
Governmental Advisory Committee



- 1. Reminder: ICANN67 Leadership Proposal for GAC Action**
- 2. Background**
- 3. Overview of EPDP Phase 2 Initial Report**
 - Proposed System for Access/Disclosure (SSAD) of non-public registration data
 - Key Proposals
 - Open Issues
 - Timeline to Delivery of SSAD
- 3. Proposed GAC Input on EPDP Phase 2 Initial Report**
- 4. Next Steps for the GAC and GAC Members**
 - Effectiveness of Interim Arrangements
 - Preparation for Accreditation of Public Authorities at National/Territory Level

1. **Review the proposed access model for access to non-public gTLD registration data** as laid out in the EPDP Phase 2 [Initial Report](#) [...] and **advocate for maximum automation of disclosure** to law enforcement and other legitimate public authorities, where legally permissible.
2. **Provide input** on a proposed GAC Comment on the EPDP Phase 2 [Initial Report](#)
3. **Discuss GAC expectations regarding the timely deployment and operation** of a Standardized System for Access and Disclosure to gTLD Registration Data (SSAD)
 - a. GAC Members may wish to consider how the GAC Accreditation Principles together with the EPDP-proposed SSAD would translate at the country/territory level
 - b. GAC Members may also wish to report on initiatives in their governments to gather the list of public authorities requiring access to non-public gTLD registration data
4. **Ensure that interim arrangements for access to non-public data are effective**

- **GAC Whois Principles Regarding gTLD WHOIS Services** (28 March 2007)
 - Recalled in GAC Abu Dhabi Communiqué (1 November 2017)
- **ICANN Community Discussion of a Unified Access Model**
 - Various proposals put forward by ICANN for Community Input
 - Legal Advice received by European law firm Hamilton Advokatbyrå
 - Public policy concerns in GAC Advice and input from GAC and GAC Members
 - Guidance provided by Data Protection Authorities
- **ICANN Temporary Specification on gTLD Registration Data** (17 May 2018)
 - Emergency Temporary Policy under ICANN Contracts
 - Objective:
 - Comply with GDPR and existing ICANN Contracts
 - Maintain WHOIS to the greatest extent possible
- **Impact of Temporary Specification:**
 - Redaction of most gTLD domain name registrants' personal data
 - Unspecified requirement of “*Reasonable Access*” to non-public data by legitimate parties leading to “*fragmentation*” and “*failing to meeting the needs of Law enforcement [and other 3rd parties]*” (GAC Barcelona Communiqué, 25 October 2018)
 - Launch of Policy Development Process

Expedited Policy Development Process (EPDP) on gTLD Registration Data

- Launched as part of emergency measures, to replace the Temporary Specification
- [Phase 1](#) (Aug. 2018 - Feb. 2019)
 - Laid out foundation of new policy framework (purposes, data elements, etc.)
 - Sufficient basis to proceed (GAC [letter](#) to ICANN Board, 24 April 2019)
 - Most Policy Recommendations [adopted](#) by ICANN Board (15 May 2019)
- [Phase 1 Implementation](#) (ongoing)
 - Interim Registration Data Policy (20 May 2019) extended Temporary Specification
 - Completion date of implementation uncertain (ICANN org [letter](#) to the GAC, 6 Jan. 2020)
- [Phase 2](#) (ongoing)
 - Focus on System for Standardized Access/Disclosure and pending issues
 - [Initial Report](#) published on 7 February. For [Public Comment](#) until 23 March 2020.
 - Final recommendations expected in June 2020

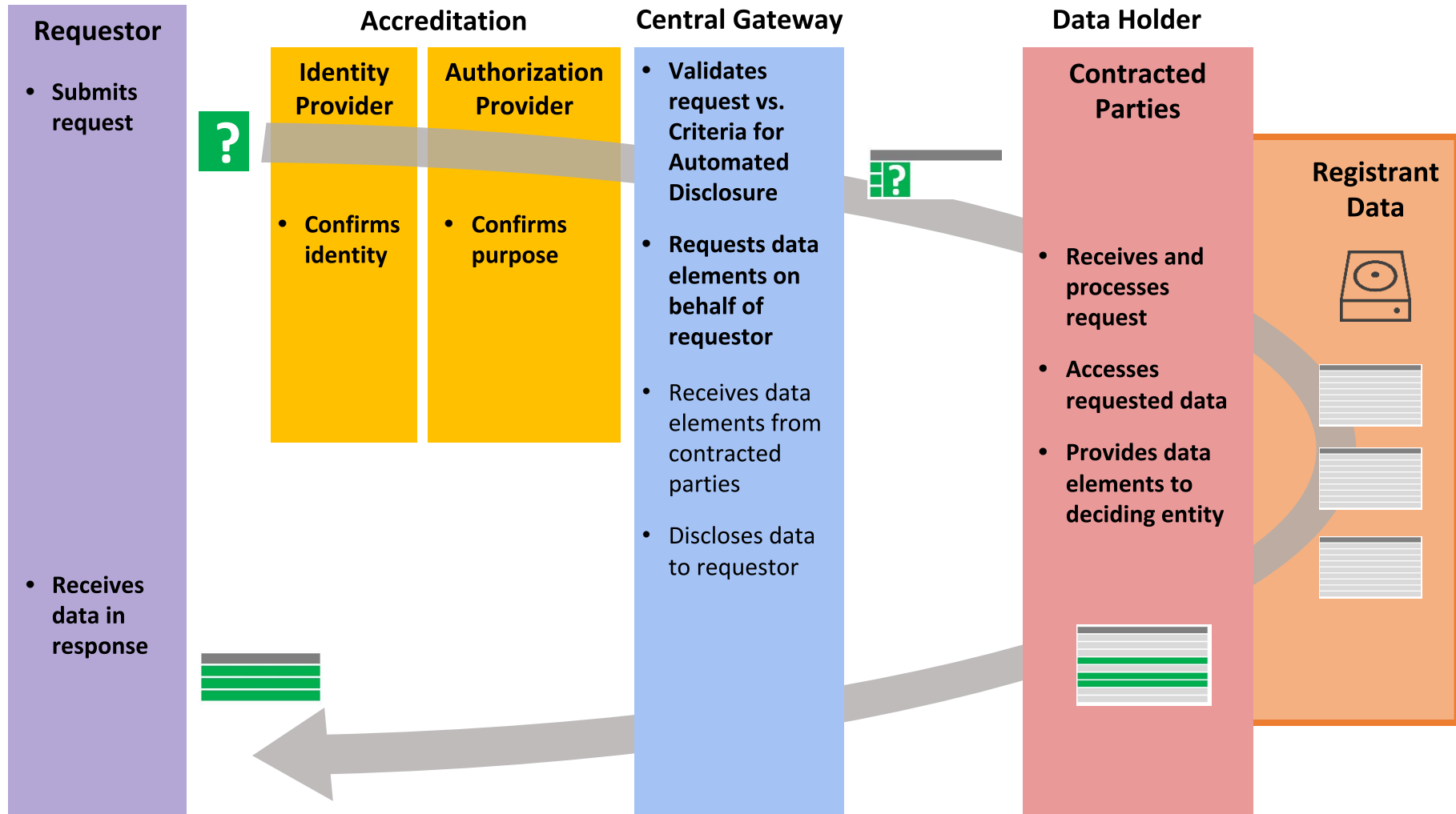
ICANN Engagement with Data Protection Authorities

- ICANN org [sought formal guidance](#) from the EU Data Protection Authorities (25 October 2019)
- The Belgian DPA [responded](#) (4 December 2019) as reported in an ICANN [blog](#) (17 Dec. 2019)
- ICANN org and the EPDP Chair subsequently met with the Belgian DPA (14 Feb. 2020)
- Per the ICANN CEO [blog](#) (19 Feb. 2020), the Belgian DPA clarified its letter:

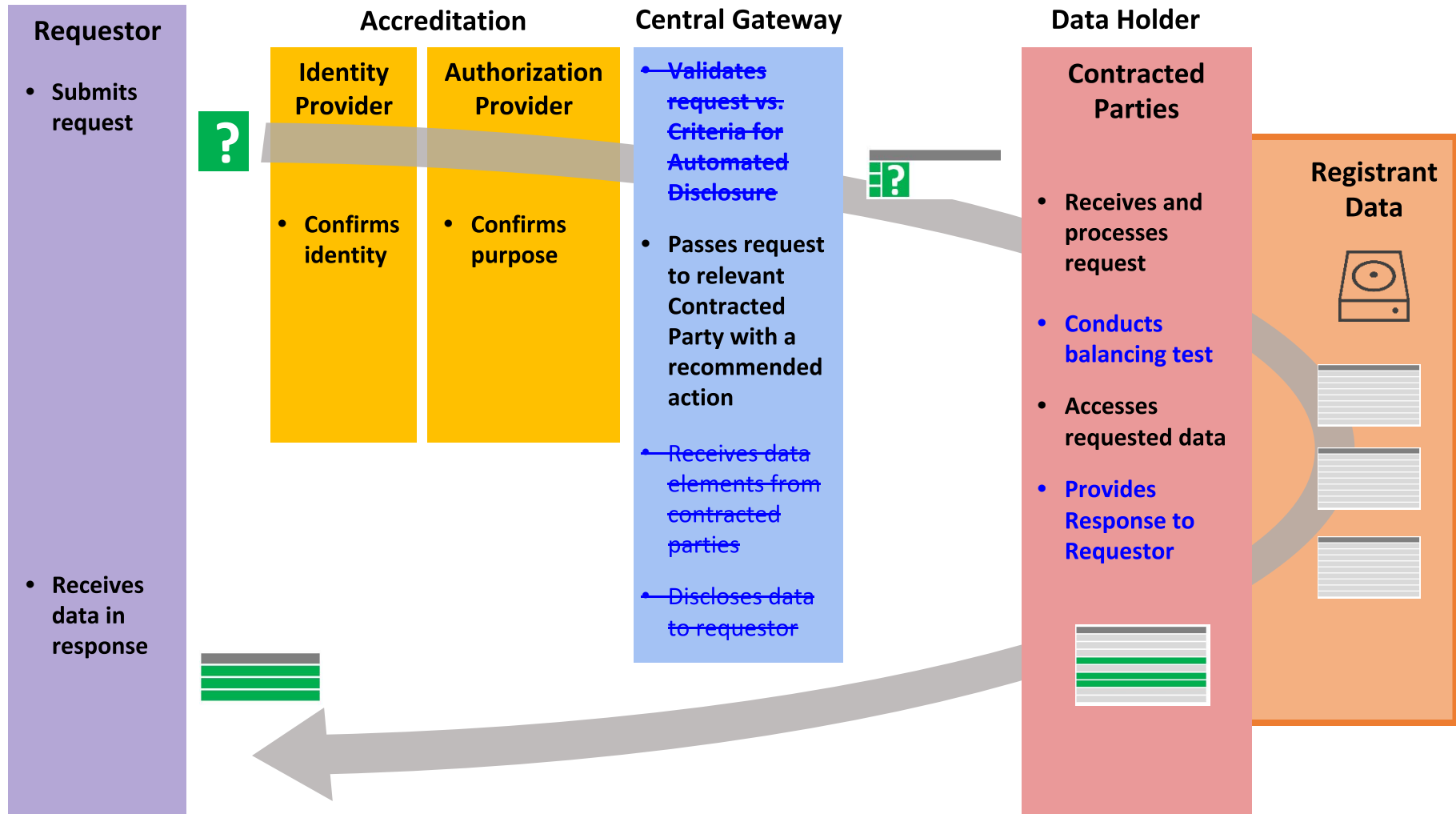
With respect to the possibility of developing a centralized model that is GDPR-compliant, the representatives said that ***the letter from the Belgian DPA was intended as encouragement to continue efforts to develop a comprehensive system for access. They said that the letter was not meant to deter the development of a centralized model. Rather, the Belgian DPA’s representatives said a centralized model is worth exploring and it seems to be a better, “common sense” option in terms of security and for data subjects. They cautioned, however, that the Belgian DPA is not in the position to give a definitive opinion on the question of controllership of such model.***

With respect to automation, the Belgian DPA’s representatives noted that ***the GDPR would not prohibit the automation of various functions in an access model. It is not how the disclosure decision is made that matters, but to be able to demonstrate that any algorithm automating decision-making considers the criteria required for such a decision to be compliant with the GDPR.***

Automated Disclosure (in limited cases)



Decentralized Disclosure (in all other cases)

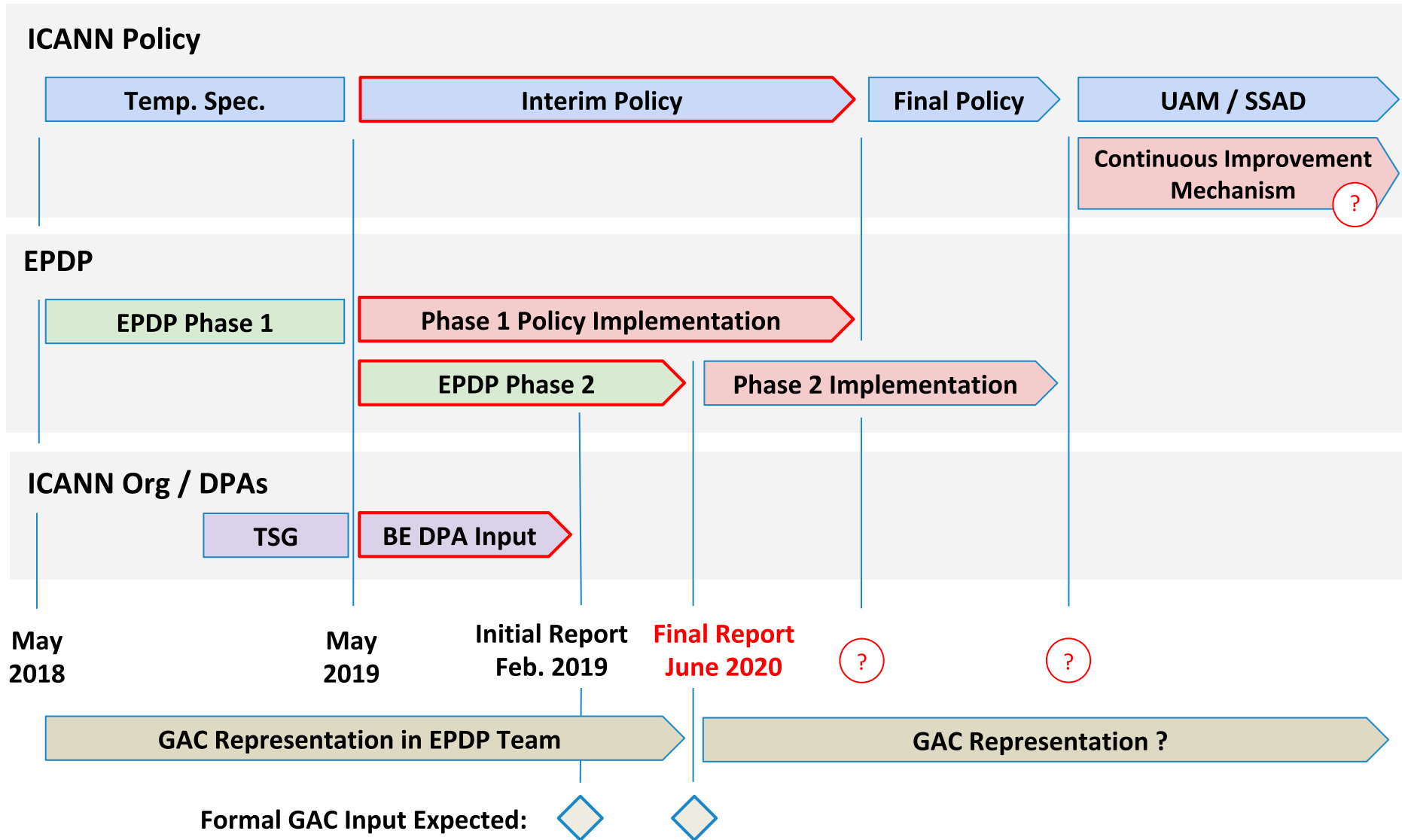


Standardized System for Access Disclosure (SSAD) to non-public gTLD Registration Data

- **Centralization of requests and decentralization of responses**
- **Continuous evolution** of the model, towards **increasing automation and standardization**, as experience is gained
- **Mechanism to be established to advise** on evolution and continuous improvement
- **Accreditation** of Public Authorities into the SSAD **to follow the GAC principles**, with oversight roles for ICANN org
- **Automated disclosure for Law Enforcement Requests in Jurisdiction**, and harmonization of responses in other cases
- **Urgent requests**: disclosure within **1 business day** expected in most cases
- **Confidentiality** of law enforcement requests
- The EPDP Phase 2 recommendations **recognize the need** for the SSAD **to meet applicable** Data Protection **legislation around the world**, not just GDPR.

- **Details of Data Controllership** for key data processing activities such as disclosure to third parties. ICANN and Contracted parties still negotiating Data Protection Agreements
- Definition of **mechanism to advise on continuous improvement** of SSAD policy.
- Extended scope of **automatic disclosure and jurisdiction criteria** for automatic disclosure in response to LEA requests.
- **Distinction between Legal and Natural person** for the redaction of contact data
- Ensuring **Accuracy of WHOIS data for purposes for which it is processed**, including disclosure in response to lawful requests by third parties with a legitimate purpose
- Impact on use and accreditation of **Privacy/Proxy Services**
- ~~Replacing data subject email address by~~ **Pseudonymized Emails** (Resolved recently)
- Preserving the possibility to deliver **Reverse Lookup** capabilities in future, for law enforcement agencies and other legitimate interests
- **Cost to public authorities** requesting non-public data.
- Implementation timeline

Timeline to delivery of SSAD



Highlights of Draft GAC Input to be proposed for GAC Members' review (10 March 2020)

- **Mechanism for evolution of SSAD** (Rec. 19):
 - Needed to benefit from experience and new info. on data protection law applicability, in a swift and efficient manner (vs. lengthy PDP)
 - Requires adequate representation of all relevant stakeholders
- **Service Level Agreement for response to Urgent Requests** (Rec. 9):
 - 24 hours (vs. 1 business day which can mean 72-hours or more for holiday week-ends)
 - Aim for 100% compliance (vs. phasing of SLAs over 18 months)
- **Automated Disclosure Requests** (Rec. 7): clarification of responsibility and jurisdiction criteria
- **Cost to Public Authorities** (Rec. 15): equitable fee structure, not cost-prohibitive to governments
- Other Items (Questions 54, 55 and 56)
 - **Timeline for Implementation of SSAD:** held to strict timeline while reasonable access is more effective and efficient
 - **Legal vs. Natural Persons:** Legal persons are not in scope of the GDPR
 - **Privacy/Proxy Services:** policy to prevent creating a double privacy shield
 - **Data Transfers** across jurisdictions: thorough analysis needed
 - **Transparency:** Quarterly reporting of detailed SSAD activity and related complaints

Timeline for finalization of GAC Input

- 10 ● **Tuesday 10 March:** Draft GAC Input circulated for GAC Review
- 11
- 12
- 13
- 14
- 15
- 16 ● **Monday 16 March:** GAC Members to provide comments and edits
- 17
- 18
- 19 ● **Thursday 19 March:** Final Draft GAC Input circulated to Membership for final review
- 20
- 21
- 22
- 23 ● **Monday 23 March:** Publication of GAC Input - **No extension possible**

Effectiveness of Interim Arrangements to Provide Reasonable Access

- [Interim Registration Data Policy](#) (20 May 2019) extended [Temporary Specification](#) (17 May 2018)
Unspecified requirement of “Reasonable Access” to non-public data by legitimate parties leading to “fragmentation” and “failing to meeting the needs of Law enforcement [and other 3rd parties]” ([GAC Barcelona Communiqué](#), 25 October 2018)
- [GAC Montréal Communiqué](#) Advice (6 Nov. 2019) and ICANN Board [response](#) (20 January 2020)

V.2.b. The GAC advises the Board to:

- Instruct the ICANN organization to ensure that the current system that requires “reasonable access” to non-public domain name registration is operating effectively. [...]***
[...] the Board accepts the GAC’s advise [...] by instructing the ICANN org to educating key stakeholder groups [...] the Board directs ICANN org to collaborate with the Registry and Registrar Stakeholder Groups to develop a voluntary standard request form [...] and actively making [it] available.
- Instruct ICANN Compliance to create a specific process to address complaints regarding failure to respond to, and unreasonable denial of requests for non-public domain name registration data [...].***
[...] the Board accepts the GAC’s advice and instructs ICANN org as part of the roll out of [a new ticketing system expected to occur in 3Q2020] to publish clear instructions on the ICANN Compliance web page describing how to submit a complaint concerning a third-party access request. Additionally, the Board instructs ICANN org to compile and publish monthly metrics [...] in the new ticketing system [...]

Effectiveness of Interim Arrangements to Provide Reasonable Access

Consider a GAC Statement:

The GAC recognized in its [Barcelona Communiqué](#) (25 October 2018) that:

- *Existing requirements in the Temporary Specification governing gTLD Registration Data are failing to meet the needs of the law enforcement and cyber-security investigators.*
- *Survey results show a clear trend that, since its implementation, the Temporary Specification has significantly affected law enforcement and cyber-security professionals' ability to investigate and mitigate crime using information that was publicly available in the WHOIS system previously:*
 - *the current WHOIS system's ability to meet law enforcement needs has been*
 - *drastically reduced;*
 - *investigations are delayed or discontinued;*
 - *many cyber-security professionals do not know how to request access for non-public information;*
 - *and many of those seeking access have been denied access.*

A [recent question](#) from EU Parliament to EU Commission noted that ““approximately 75%” of requests for access remain unanswered” (11 Feb. 2020)

In light of these concerns, and recognizing that EPDP Phase 2 Recommendations already include consensus agreement on the *Criteria and Content of Requests for Access to Non-public Data*, the GAC should:

- **Strongly urge ICANN and contracted parties to swiftly develop and implement standardized form for these requests to improve efficiency of current interim system**

Future Accreditation of Public Authorities

- [GAC Accreditation Principles](#) (21 January 2020) adopted as Recommendation 2 in EPDP Phase 2 Initial Report
 - Each country/territory to appoint its own identity provider.
 - Each country/territory to set its own eligibility requirements to gain credentials.
 - Oversight Role for ICANN org as ultimate accreditation authority
 - National/Territory accreditation authorities expected to coordinate with ICANN org in order to facilitate appropriate delivery and interoperability of credentials into the SSAD
- In preparation for future implementation, [GAC Members](#) may wish to:
 - Consider how the GAC Accreditation Principles together with the EPDP-proposed SSAD would translate at the country/territory level
 - Encourage their governments to identify public authorities requiring access to non-public gTLD registration data
 - Review the European Commission [contribution](#) (GAC Mailing List, 9 March 2020)